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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA  
8

9 FOUNDATION AUTO HOLDINGS, LLC,

10 Plaintiff,

11 v.

12 WEBER MOTORS, FRESNO, INC., et al.,

13 Defendants.

Case No. 1:21-cv-00970-NONE-EPG

FINDINGS AND RECOMMENDATION TO  
GRANT MOTION TO INTERVENE

(ECF No. 16)

OBJECTIONS, IF ANY, DUE WITHIN  
FOURTEEN DAYS

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15 Before the Court is Proposed Plaintiff-in-Intervention Templeton Marsh, Ltd.’s motion to  
16 intervene. (ECF No. 16). For the reasons described below, the undersigned recommends that the  
17 motion to intervene be granted.

18 **I. BACKGROUND<sup>1</sup>**

19 Plaintiff Foundation Auto Holdings, LLC (“Plaintiff” or “Foundation”) is a Delaware  
20 limited liability company with twenty-three stores in Canada and the United States and  
21 “provide[s] modern automotive solutions across North America.” (ECF No. 1 at 2).<sup>2</sup> Defendant  
22 Weber Motors (“Weber”) owns and operates a BMW dealership in Fresno, Defendant CJ’s Road  
23 to Lemans Corp. (“Lemans”) owns and operates an Audi dealership and Porsche dealership in  
24 Fresno. (*Id.*) . Defendant Christopher John Wilson (“Wilson” and, together with Weber and  
25 Lemans, collectively the “Defendants”) is the trustee of the trust that is the primary owner of  
26 Weber and Lemans. (*Id.* at 2–3). Proposed Plaintiff-in-Intervention Templeton Marsh, Ltd.

27 <sup>1</sup> The Court relies on the allegations in the Complaint (ECF No. 1) and Templeton Marsh’s proposed Complaint in  
Intervention (ECF No. 16-1) for this background summary.  
28 <sup>2</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 (“Templeton Marsh”) “is a Canadian corporation which specializes in introducing prospective  
2 buyers and sellers for automotive dealership transactions.” (ECF No. 16-1 at 3).

3 On April 30, 2020, Wilson, on behalf of Weber and Lemans, entered into a  
4 Representation Agreement with Templeton Marsh to assist in finding a partner to become the  
5 majority owner of the BMW, Audi, and Porsche dealerships owned by Weber and Lemans. (ECF  
6 No. 1 at 3; ECF No. 16-1 at 4). The Representation Agreement provides that Templeton Marsh is  
7 entitled to a Success Fee of either: (1) 5% of the total value of the goodwill, fixed assets,  
8 intangible assets, and party inventories of the transaction completed between Defendants and any  
9 potential buyer; or (2) in the event the land and buildings in use for the auto dealerships are  
10 leased, 2% of the value of the transaction completed between Defendants and any potential  
11 buyer. (ECF No. 16-1 at 4–5).

12 With the assistance of Templeton Marsh, Foundation and Defendants negotiated the  
13 terms of a deal for Foundation to purchase a majority stake in the BMW, Audi, and Porsche  
14 dealerships. (ECF No. 1 at 3). On November 30, 2020, Foundation and Wilson, both individually  
15 and on behalf of Weber and Lemans, executed and entered into an Asset Purchase Agreement  
16 (“APA”). (Id. at 4).

17 By letter dated June 8, 2021, Foundation notified Defendants that it considered them in  
18 breach of the APA, noting the following failures to meet obligations under the agreement:

- 19 a. Weber and Lemans’ failure to disclose Wilson’s pledge, in his  
20 capacity as trustee, of the Trust’s equity ownership in Weber and  
Lemans to a creditor, in breach of applicable dealer sales and  
service agreements with the manufacturers;
- 22 b. Wilson’s failure to provide information with respect to his trust  
and his net worth as required by the manufacturers in connection  
with their approval of the subject transactions;
- 24 c. Wilson’s refusal to agree to the non-compete agreement and the  
employment agreement, as attached to the APA;
- 26 d. Their failure to engage in any negotiations in good faith with  
respect to the form of amended and restated limited liability  
company agreements for each of the new entities, to be agreed to  
by the parties under Section 3.2(j) of the APA;
- 28 e. Weber and Lemans’ apparent lack of sufficient assets to pay all  
amounts owing to creditors outstanding as of the closing date for

1 all obligations not assumed by Foundation, as suggested in  
2 statements made by Wilson and Mr. Borkum to Foundation; and

3 f. Wilson and Lemans' failure to take all action reasonably  
4 requested by Foundation to carry out the transactions contemplated  
5 under the APA, including, without limitation, (i) failing to pay all  
6 current and delinquent contributions it or a member of Seller's  
7 controlled group are obligated to pay to the I.A.M. National  
8 Pension Fund, and (ii) failing to obtain an estimate of the  
9 withdrawal liability that it or a member of Seller's controlled group  
10 will be obligated to pay as a result of withdrawal from the I.A.M.  
11 National Pension Fund.

12 (ECF No. 1 at 11–12). On June 11, 2021, attorneys for Weber and Lemans served a letter on  
13 Foundation purporting to terminate the APA and declaring the agreement without force or effect.  
14 (Id. at 13).

15 On June 18, 2021, Foundation commenced this action by filing a complaint for breach of  
16 contract. (ECF No. 1). On August 3, 2021, Defendants moved to dismiss the complaint for  
17 failure to state a claim for relief. (ECF No. 7). Defendants argue that the complete terms of the  
18 contract are missing from the complaint and that Plaintiff failed to allege sufficient facts  
19 regarding performance of its obligations under the contract. Defendants contend that due to  
20 Plaintiff's failure to fulfill its obligations prior to closing, any obligation to close expired through  
21 no fault of Defendants. (Id. at 2, 6). Plaintiff filed an opposition, and Defendants filed a reply.  
22 (ECF Nos. 11, 12).

23 On September 15, 2021, Proposed Plaintiff-in-Intervention Templeton Marsh filed the  
24 instant motion to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2),  
25 or, in the alternative, permissively under Rule 24(b)(1)(B). (ECF No. 16). To date, no opposition  
26 to the motion has been filed, and the time for doing so has passed.

27 **II. LEGAL STANDARD**

28 Intervention as a matter of right is governed by Federal Rule of Civil Procedure 24(a),  
which provides that “[o]n timely motion, the court must permit anyone to intervene who . . .  
claims an interest relating to the property or transaction that is the subject of the action, and is so  
situated that disposing of the action may as a practical matter impair or impede the movant’s  
ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R.

1 Civ. P. 24(a)(2). When analyzing a motion to intervene of right under Rule 24(a)(2), the Ninth  
 2 Circuit applies the following four-part test:

3                     (1) the motion must be timely; (2) the applicant must claim a  
 4 “significantly protectable” interest relating to the property or  
 5 transaction which is the subject of the action; (3) the applicant  
 6 must be so situated that the disposition of the action may as a  
 practical matter impair or impede its ability to protect that interest;  
 and (4) the applicant’s interest must be inadequately represented by  
 the parties to the action.

7 Cooper v. Newsom, 13 F.4th 857, 864 (9th Cir. 2021) (quoting Wilderness Soc’y v. U.S. Forest  
 8 Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc)). “Each of these four requirements must be  
 9 satisfied to support a right to intervene,” Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir.  
 10 2003), and “the party seeking to intervene bears the burden of showing those four elements are  
 11 met,” Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006). “The four parts of the test ‘often are  
 12 very interrelated and the ultimate conclusion reached as to whether intervention is of right may  
 13 reflect that relationship.’” Cooper, 13 F.4th at 865 (quoting Wright & Miller, 7C Fed. Prac. &  
 14 Proc. Civ. § 1908 (3d ed. 2020 update)).

15                     “In determining whether intervention is appropriate, we are ‘guided primarily by practical  
 16 and equitable considerations, and the requirements for intervention are broadly interpreted in  
 17 favor of intervention.’” Cooper, 13 F.4th at 865 (quoting United States v. Alisal Water Corp.,  
 18 370 F.3d 915, 919 (9th Cir. 2004)). See Smith v. Los Angeles Unified Sch. Dist., 830 F.3d 843,  
 19 853 (9th Cir. 2016) (noting that the Ninth Circuit has “repeatedly instructed that ‘the  
 20 requirements for intervention are [to be] broadly interpreted in favor of intervention’” (quoting  
 21 Alisal Water Corp., 370 F.3d at 919)). A liberal interpretation of the rule “serves both efficient  
 22 resolution of issues and broadened access to the courts. By allowing parties with a practical  
 23 interest in the outcome of a particular case to intervene, we often prevent or simplify future  
 24 litigation involving related issues[.]” Forest Conservation Council v. U.S. Forest Serv., 66 F.3d  
 25 1489, 1496 n.8 (9th Cir. 1995) (citations omitted).

26                     Rule 24 also allows for permissive intervention for anyone who “has a claim or defense  
 27 that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B).  
 28 “An applicant who seeks permissive intervention must prove that it meets three threshold

1 requirements: (1) it shares a common question of law or fact with the main action; (2) its motion  
2 is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims.”  
3 Cooper, 13 F.4th at 868 (quoting Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998)).  
4 Even if the threshold requirements are satisfied, the district court has discretion to deny  
5 permissive intervention after “considering whether intervention will unduly delay the main  
6 action or will unfairly prejudice the existing parties.” Cooper, 13 F.4th at 868 (citing Donnelly,  
7 159 F.3d at 412).

8       **III. DISCUSSION**

9           **A. Intervention as of Right**

10          As noted above, “[e]ach of th[e] four requirements must be satisfied to support a right to  
11 intervene.” Arakaki, 324 F.3d at 1083. “Failure to satisfy any one of the requirements is fatal to  
12 the application, and we need not reach the remaining elements if one of the elements is not  
13 satisfied.” Perry v. Proposition 8 Off. Proponents, 587 F.3d 947, 950 (9th Cir. 2009).

14            1. Timeliness

15          The timeliness of a motion to intervene as of right is determined “by the totality of the  
16 circumstances facing prospective intervenors, with a focus on three primary factors: (1) the stage  
17 of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and  
18 (3) the reason for and length of the delay.” Smith, 830 F.3d at 854 (internal citation omitted).  
19 “Timeliness is a flexible concept; its determination is left to the district court’s discretion.” Alisal  
20 Water Corp., 370 F.3d at 921. The Court will consider each of these factors in turn.

21          Here, the motion to intervene was filed at an early stage of the proceedings. Although a  
22 motion to dismiss has been filed, the Court has not ruled on the motion. Further, no Rule 26(f)  
23 conference has occurred, no Rule 26 disclosures have been made, and no discovery has  
24 commenced. As the Court has not substantively engaged in the issues presented in this case, this  
25 factor weighs in favor of a finding of timeliness. See League of United Latin Am. Citizens v.  
26 Wilson (LULAC), 131 F.3d 1297, 1303 (9th Cir. 1997) (“We believe that the fact that the district  
27 court has substantively - and substantially - engaged the issues in this case weighs heavily  
28 against allowing intervention as of right under Rule 24(a)(2).”).

1        “[P]rejudice to existing parties is ‘the most important consideration in deciding whether a  
2 motion for intervention is untimely.’” Smith, 830 F.3d at 857 (quoting United States v. Oregon,  
3 745 F.2d 550, 552 (9th Cir. 1984)). “[T]he only ‘prejudice’ that is relevant under this factor is  
4 that which flows from a prospective intervenor’s failure to intervene after he knew, or reasonably  
5 should have known, that his interests were not being adequately represented—and not from the  
6 fact that including another party in the case might make resolution more ‘difficult[ ].’” Smith,  
7 830 F.3d at 857 (second alteration in original) (quoting Oregon, 745 F.2d at 552–53). Templeton  
8 Marsh did not unduly delay filing its motion to intervene, and as the motion was filed at an early  
9 stage of the proceedings before the Court substantively engaged in the issues presented, it  
10 appears no party would be prejudiced. See Northwest Forest Resource Council v. Glickman, 82  
11 F.3d 825, 837 (9th Cir. 1996) (holding that motion to intervene was timely because it “does not  
12 appear to have prejudiced either party in the lawsuit, since the motion was filed before the  
13 district court had made any substantive rulings”).

14        The complaint in this case was filed on June 18, 2021. Proposed Plaintiff-in-Intervention  
15 Templeton Marsh became aware of this suit on July 31, 2021. (ECF No. 16-3 at 5; ECF No. 16-  
16 10 at 2). Templeton Marsh immediately contacted counsel for Plaintiff and began meeting and  
17 conferring with all appearing parties. (ECF No. 16-3 at 6). The motion to intervene was filed on  
18 September 15, 2021, three months after the complaint was filed and one and a half months after  
19 Templeton Marsh became aware of this suit. Based on the record before this Court, it appears  
20 that Templeton Marsh acted promptly and there is no indication there was undue delay.

21        Based on the foregoing, in light of the totality of the circumstances, the undersigned finds  
22 that the motion to intervene is timely.

23              2. Significant Protectable Interest

24        “A would-be intervenor has a significant protectable interest if the interest is protected by  
25 law and there is a relationship between that interest and the claim or claims at issue.” Cooper, 13  
26 F.4th at 865 (citing Alisal Water Corp., 370 F.3d at 919). “[A] non-speculative, economic  
27 interest may be sufficient to support a right of intervention.” Alisal Water Corp., 370 F.3d at 919  
28 (citing Arakaki, 324 F.3d at 1088). “To trigger a right to intervene, however, an economic

1 interest must be concrete and related to the underlying subject matter of the action.” Alisal Water  
2 Corp., 370 F.3d at 919 (citations omitted).

3       Here, the Representation Agreement provides that Templeton Marsh be paid a Success  
4 Fee by Defendants pursuant to any transaction completed between Defendants and any potential  
5 buyer. Thus, Templeton Marsh has an economic interest in seeing that its Success Fee is paid  
6 from the closing funds of the dealership sale agreement that is governed by the APA, which is  
7 the underlying subject matter of this action. Accordingly, the undersigned finds that Templeton  
8 Marsh has a significant protectable interest to support intervention. See CRI, Inc. v. Watson, 608  
9 F.2d 1137, 1140 n.2 (8th Cir. 1979) (finding that investment company that introduced shopping  
10 center owner to potential source of financing and was to receive a fee when agreement between  
11 the other two was closed had a sufficient interest in the suit brought by the potential financer  
12 against the owner to intervene as of right in the action).

13           3. Practical Impairment

14       “The question of whether protectable interests will be impaired by litigation ‘must be put  
15 in practical terms rather than in legal terms.’” Akina v. Hawaii, 835 F.3d 1003, 1011–12 (9th Cir.  
16 2016) (Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1908.2 (3d ed. 2007)). The Ninth Circuit  
17 has “follow[ed] the guidance of Rule 24 advisory committee notes that state that ‘[i]f an absentee  
18 would be substantially affected in a practical sense by the determination made in an action, he  
19 should, as a general rule, be entitled to intervene.’” Sw. Ctr. for Biological Diversity v. Berg, 268  
20 F.3d 810, 822 (9th Cir. 2001) (quoting Fed. R. Civ. P. 24 advisory committee note to 1966  
21 amendment).

22       Here, Templeton Marsh’s Success Fee is contingent upon a *completed* transaction  
23 between Defendants and a buyer. Thus, determinations made in this action regarding whether the  
24 APA is a valid and enforceable contract and whether Plaintiff is entitled to specific performance  
25 of the APA will substantially affect whether Templeton Marsh receives its Success Fee pursuant  
26 to Representation Agreement. The factual and legal issues to be resolved in this action are likely  
27 to be relevant to the factual and legal issues underlying Templeton Marsh’s dispute with  
28 Defendants regarding breach of contract and specific performance of the Representation

1 Agreement. Accordingly, the undersigned finds that the disposition of this action may as a  
2 practical matter impair or impede Templeton Marsh's ability to protect its interest. See Watson,  
3 608 F.2d at 1140 n.2 (finding that investment company that introduced shopping center owner to  
4 potential source of financing and was to receive a fee when agreement between the other two  
5 was closed “risked, as a practical matter, impairment of its ability to protect its interest by  
6 disposition of the suit [brought by the potential financer against the owner] in its absence”  
7 because “judgment in [owner]’s favor would clearly have been compelling precedent adverse to  
8 its own cause of action”).

9                  4. Inadequate Representation

10                 The Ninth Circuit considers the following three factors in determining the adequacy of  
11 representation:

12                 (1) whether the interest of a present party is such that it will  
13                 undoubtedly make all of a proposed intervenor’s arguments; (2)  
14                 whether the present party is capable and willing to make such  
15                 arguments; and (3) whether a proposed intervenor would offer any  
               necessary elements to the proceeding that other parties would  
               neglect.

16                 Arakaki, 324 F.3d at 1086 (citing California v. Tahoe Reg'l Planning Agency, 92 F.2d 775, 778  
17 (9th Cir. 1986)). “The burden of showing inadequacy of representation is ‘minimal’ and satisfied  
18 if the applicant can demonstrate that representation of its interests ‘may be’ inadequate.” Citizens  
19 for Balanced Use v. Montana Wilderness Ass’n, 647 F.3d 893, 898 (9th Cir. 2011) (quoting  
20 Arakaki, 324 F.3d at 1086).

21                 “The most important factor in determining the adequacy of representation is how the  
22 interest compares with the interests of existing parties.” Arakaki, 324 F.3d at 1086. “When an  
23 applicant for intervention and an existing party have the same ultimate objective, a presumption  
24 of adequacy of representation arises. If the applicant’s interest is identical to that of one of the  
25 present parties, a compelling showing should be required to demonstrate inadequate  
26 representation.” Id. (citations omitted).

27                 Both Plaintiff and Templeton Marsh’s causes of action arise from the dealership sale  
28 between Foundation and Defendants, and Plaintiff and Templeton Marsh’s rights to recovery

1 require the completion of the transactions contemplated under the APA. However, Foundation  
2 and Templeton Marsh do not have the same ultimate objective and their interests are not  
3 identical because Templeton Marsh's right to recovery is based on a separate Representation  
4 Agreement, which has not been presented to the Court by the existing parties. Accordingly, the  
5 undersigned finds that Templeton Marsh has met its minimal burden of demonstrating that  
6 representation of its interests may be inadequate.

7           **5. Conclusion**

8           As set forth above, Proposed Plaintiff-in-Intervention Templeton Marsh has satisfied the  
9 four requirements to support a right to intervene. The existing parties have not filed oppositions  
10 to intervention, and given the Ninth Circuit's repeated instruction that the requirements for  
11 intervention are to be broadly interpreted in favor of intervention, the undersigned recommends  
12 that the motion to intervene as of right under Rule 24(a)(2) be granted.

13           **B. Permissive Intervention**

14           Although the undersigned finds that Templeton Marsh may intervene as of right under  
15 Rule 24(a)(2), the Court will also address Templeton Marsh's alternative argument that it be  
16 permitted to intervene under Rule 24(b)(1)(B). The three threshold requirements for permissive  
17 intervention are: "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a  
18 common question of law and fact between the movant's claim or defense and the main action."  
19 Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 843 (9th Cir. 2011) (quoting  
20 Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992)).

21           Here, there is an independent ground for jurisdiction because complete diversity of  
22 citizenship exists between the existing parties and Proposed Plaintiff-in-Intervention Templeton  
23 Marsh and the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332; Geithner, 644  
24 F.3d at 843 (noting the independent jurisdictional requirement stems "from our concern that  
25 intervention might be used to enlarge inappropriately the jurisdiction of the district courts" and  
26 that "manifests itself most concretely in diversity cases where proposed intervenors seek to use  
27 permissive intervention to gain a federal forum for state-law claims over which the district court  
28 would not, otherwise, have jurisdiction"). As discussed in section III(A)(1), *supra*, the motion to

1 intervene was timely. See LULAC, 131 F.3d at 1308 (stating that courts consider the same three  
2 factors when determining whether a motion to intervene is timely under Rule 24(a) and Rule  
3 24(b)). Lastly, Templeton Marsh's claims against Defendants have common questions of fact  
4 with the main action, *i.e.*, the dealership sale between Foundation and Defendants pursuant to the  
5 APA.

6 The threshold requirements are satisfied, and as there is no indication that intervention  
7 will unduly delay this action or will unfairly prejudice the existing parties, the undersigned  
8 recommends that the alternative motion to intervene permissively under Rule 24(b)(1)(B) be  
9 granted.

10 **IV. CONCLUSION**

11 Accordingly, the undersigned HEREBY RECOMMENDS that Proposed Plaintiff-in-  
12 Intervention Templeton Marsh's motion to intervene (ECF No. 16) be GRANTED under Federal  
13 Rule of Civil Procedure 24(a)(2), or alternatively, under Rule 24(b)(1)(B).

14 These Findings and Recommendations will be submitted to the United States District  
15 Court Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within  
16 **FOURTEEN (14) days** after being served with a copy of these Findings and Recommendations,  
17 any party may file written objections with the court and serve a copy on all parties. Such a  
18 document should be captioned "Objections to Magistrate Judge's Findings and  
19 Recommendations." Any reply to the objections shall be served and filed within **FOURTEEN**  
20 **(14) days** after service of the objections. The parties are advised that failure to file objections  
21 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772  
22 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

23 IT IS SO ORDERED.  
24

25 Dated: December 7, 2021

26 /s/ *Eric P. Groj*  
27 UNITED STATES MAGISTRATE JUDGE  
28